(1)

04-46 JUL 3 2004

No.

IN THE

SUPREME COURT of the UNITED STATES

KENDRA LYNN WATT,

Petitioner

v.

STATE OF WASHINGTON,

Respondent

ON WRIT OF CERTIORARI TO THE
WASHINGTON COURT OF APPEALS, DIVISION III

PETITION FOR WRIT OF CERTIORARI

ROLAND D. WATSON
Counsel of Record
Watson Law Office
408 Sherman Ave, St. 202
Coeur d' Alene, ID 83816
(208)661-0500

QUESTIONS PRESENTED

Whether the Confrontation Clause prohibits admission of codefendant's statements in guilty pleas against other codefendants absent witness unavailability and a prior opportunity for cross-examination mandated in *Crawford v. Washington*, 2004 WL.413301.

Whether the Confrontation Clause prohibits admission of codefendant's statement made in a police interrogation against other codefendants absent witness unavailability and a prior opportunity for cross-examination mandated in *Crawford v. Washington*, 2004 WL.413301.

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PETITION FOR A WRIT OF CERTIORARI

Kendra Lynn Watt petitions for a writ of certiorari to the Washington State Court of Appeals, Division III, in *State v. Watt*, No. 21148-7-III.

OPINIONS BELOW

The opinion of the Washington Court of Appeals is reported at State of Washington v. Kendra Lynn Watt. No. 21148-7-III (2003) and is reproduced at App. 1 at 1-29. The order of the Washington Supreme Court denying discretionary review of that decision was issued April 6, 2004, and is reproduced at App. 2 at 1. The trial courts' rulings at trial were not published.

STATEMENT OF JURISDICTION

The Washington Supreme Court issued its order denying Petitioner's petition for review on April 6, 2004. App.2 at 1 This court has jurisdiction under U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right..... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

1. This case presents the Court with an opportunity to clarify the operation of the Confrontation Clause and the courts' ruling that absent witness unavailability and a prior opportunity for cross-examination testimonial statements may not be used in criminal trials. At issue is whether the court in Petitioner's criminal trial erred in allowing the State to introduce a "statement of defendant on plea of guilty" of a potential accomplice who was "unavailable for trial." A second issue is the admission, over defense objections at trial, of a police detectives statements attributed to a suspected accomplice and made during a custodial interrogation. The Washington Court of Appeals upheld the admission of the "statement of defendant on plea of guilty" of an accomplice which reads as follows:

"I admit to making a small amount of meth [.] I did so in a detached garage on the premises. The children lived on the premises but were not present when I made the drugs."

The prosecution admitted at trial that they never had any intention to bring the accomplice to testify about his statements. The court nevertheless ruled the "statement of defendant on plea of guilty" was admissible as to the alleged accomplice (wife/petitioner). The Court of Appeals upheld the trial courts position that the statement was admissible and sufficiently reliable. App. 1 at 1-16. The Washington Court of Appeals found the statement reliable based upon the reasoning of *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

As the trial proceeded, the prosecution offered a statement that Detective Runge attributed to the accomplice/husband that said "he stated that he manufactured the anhydrous ammonia himself. It was fewer people to be aware of what he was involved in and he also didn't believe in theft..... He said he made his own anhydrous ammonia." App.3 at . The trial court admitted both of the statements and the Washington Court of Appeals upheld the introduction of these statements citing *State v. Roberts*, 142 Wn.2d 471, 495, 14 P.3d 713 (2000);*State v. Crawford*, 147 Wn.2d 424, 435, 54 P.2d 656 (2002) cert granted sub nom, *Crawford v.*

Washington, 123 S.Ct. 2275 (2003). The Court of Appeals ruled that both statements had sufficient indicia of reliability to satisfy the Confrontation Clause and upheld the trial court. The Washington Supreme Court denied the Petition for Review on April 6, 2004. App.2 at 1.

2. The defendant, Kendra Watt, resided at her home at 402 Abbott Street, Richland, Washington, with her husband James Watt. The Tri-City Metro Drug Task Force Detective Rick Runge obtained a search warrant based on his affidavit. On June 1, 2001 at approximately 11:00 A.M., the officers of the Metro Drug Task Force executed the search of 402 Abbott Street, Richland, Washington. The home was a ranch style home with a detached garage located in the northeast corner of the backyard. Mr. James Watt and Mrs. Kendra Watt were both arrested and charged with drug charges involving the manufacture of methamphetamine. App. 3 at 2.

Kendra L. Watt was charged with manufacturing and possession of methamphetamine and second degree criminal mistreatment. Prior to trial, her husband and alleged accomplice,

pled guilty to manufacturing methamphetamine pursuant to a plea agreement. On February 14, 2004, the state issued a subpoena for James E. Watt. The state argued that it wanted to introduce in opening argument the plea of Mr. James Watt in the trial against Mrs. Watt. The defense objected and the court ruled that this information should not come in during opening statements. But the court indicated a willingness to allow the state to introduce the "Statement of Defendant on Plea of Guilty" at trial. The defendant noted an exception to the court's ruling. At trial, through her counsel, Ms. Watt objected to the introduction of a "Statement of Defendant on Plea of Guilty" that the government sought to introduce against her. Although the prosecutor stated he never intended to call the husband at trial, the trial court admitted the husband's statement. Defense counsel objected that this violated Ms. Watt's Confrontation Right. App. 3 at 3.

The state prepared a certified copy of Mr. Watt's Statement of the Defendant on Plea of Guilty, crossing out "I have reviewed the evidence against me on my own with my attorney. I've come to the conclusion that a jury would find me guilty after hearing the

evidence on all three counts, as well as the enhancement. I wish to take advantage of the State's offer." Other information blocked out included "I admit to making a small amount of meth" and "For my wife's use." The prosecutor sought to admit the redacted pages 1 and 7 of Mr. Watt's Statement on Plea of guilty as Exhibit 83. The two pages that were admitted had large spaces that were blacked out. The defense argued against admission of the document arguing that if the purpose of admitting the document was to show Mr. Watt's plea that could be accomplished without using the statement on plea of guilty. The argument against admission of the document was renewed again prior to admission of the document. Cases cited by defense counsel included *State v. Hoffman*, 116 Wn.2d 51 (1991); *Bruton v. United States*, 391 U.S. 123 (1968); and *Gray v. Maryland*, 532 U.S. 185 (1998). A limiting instruction was requested and the court stated, "I will do the limiting instruction. The sole purpose of the admission is to establish Mr. Watt pled guilty and the jury may consider it for no other purpose." The defense requested and court ordered instruction was never given after the decision was made by the court to give the limiting instruction. App. 3 at 4-5.

Additionally, the prosecution at trial sought to introduce hearsay statements allegedly made by Mr. James Watt to Detective Rick Runge that "he manufactured his own anhydrous ammonia." The defense objected arguing that this was an attempt to introduce testimony without granting the defense the right of confrontation. The court ruled that only testimony that Mr. Watt made his own anhydrous would be admitted. Then the prosecution brought testimony beyond that allowed by the court's order. Detective Runge testified that "It was fewer people to be aware of what he was involved in and he also didn't believe in theft and that's how. He said he made his own anhydrous ammonia." The defense sought a mistrial for the prosecution's violation of the court's order. The court refused the defense motion for a mistrial. App. 3at 5-6.

In closing argument, the prosecutor argued that, "Mr. Watt, you'll see his Statement on Plea of Guilty, pled guilty because he has the methamphetamine lab and because he was around children." The prosecution argued that if the jury convicted her of manufacture, "that this follows as night follows day – that she created an imminent and substantial risk." Further, in closing argument during rebuttal

the prosecutor argued repeatedly, "Mr. Phelps said", "Mr. Phelps said, well, maybe," at which time the defense objected to the personalization of the argument. The court admonished and instructed the prosecutor on how to form the argument. The prosecutor then returned to argue, "We know that's true. You can take a look at what Mr. Watt said about this in his Statement on Plea of Guilty. He said I make methamphetamine." Then the prosecutor returned to arguing about the defense counsel stating, "There is nobody who says that ...I'm gonna go back to this – except the defense attorney." An objection was made, citing the prosecutorial misconduct in continuing this tactic after a court instruction, with a motion for mistrial. The court denied the motion for mistrial and instructed the prosecutor again. App. 3 at 6-7.

The case proceeded and the jury was instructed by the court without any limiting instruction on the use of the Statement of Defendant James Watt designated as Exhibit 83. Kendra Watt never testified at her trial. The defense moved the court for a new trial which was denied by the court. On May 22, 2002 Kendra Watt was sentenced before Judge Carolyn Brown. App. 3 at 7.

REASONS FOR GRANTING THE WRIT

The United States Supreme Court ruled that: The Confrontational Clause commands that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. *Roberts* allows a jury to hear evidence untested by the adversary process, based on mere judicial determination of reliability; thus replacing the constitutionally prescribed method of assessing reliability with a wholly foreign one. *Crawford v. Washington*, 02-9410 (2004).

This case involves a Washington Appellate Court ruling based upon *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000) and *State v. Crawford*, 147, Wn.2d 424, 54 P.2d 656 (2000) both of which were overruled in *Crawford v. Washington*, 02-9410 (2004). The testimonial evidence involved in the case before the court is a statement given at a guilty plea and a statement provided during a police interrogation. Both of these statements fall within the parameters of testimonial evidence which must be tested by the constitutional right of confrontation. (Cross-examination at trial.) The decision of the Washington State Court of Appeals contravenes

the decision of this court in *Crawford v. Washington,* 2-941 (2004), requiring granting of the writ of certiorari.

A. This court should resolve issues as to what evidence qualifies as testimonial evidence for purposes of determining admission of guilty pleas in light of this courts ruling in *Crawford v. Washington*, 2004 WL413301.

The Washington Court of Appeals ruled that the prosecution in a criminal case may admit at trial the statement of a husband against an accomplice spouse, without any opportunity to cross-examine the husband regarding his statement. App. 1 at 1-16. The Washington State Supreme Court denied review of Petitioner's petition for review on April 6, 2004, almost one month after the United States Supreme Courts ruling in *Crawford v. Washington*, 2004 WL413301.

The ruling of the Washington Appellate Court is contrary to the holding in *Crawford* requiring that testimonial evidence be subjected to cross-examination based upon the Confrontation Clause. The statement of a defendant on a guilty plea is considered

testimonial evidence even though it is made "in court". *Crawford v. Washington*, 124 S.Ct. at 1372, abrogating *United States v. Aguillar*, 295 F.3d 1018, 1021-1023 (CA92002) in deciding the Watt case. It is important to consider that the Washington Appellate Court relied upon *United States v. Aguillar*, 295 F.3d at 1022-1023 (CA92002) in deciding the Watt case. It would appear that the Washington State Courts are attempting to argue that statements made in court may be admitted without the opportunity to cross-examine the witness. The results of this decision is that criminal defendants continue to be denied the opportunity to cross-examine or confront those testifying against them in a criminal trial. It is for this very reason that the petitioner request this court grant review.

The United States Supreme Court in *Crawford* at 1372 made it clear that a long list of in court statements would not be allowed absent an opportunity to cross-examine, including grand jury testimony citing *United States v. Certracchio*, 265 F.3d 518, 527-530 (CA720011); *United States v. Dolah*, 245 F.3d 98, 104-105 (CA22000) and others, and prior trial testimony. *State v. McNeill*, 140 NC.App 450, 457-460, 537 S.E. 2d 518, 523-524 (2000). Once

more, the decision by the Washington Court of Appeals admitting a guilty plea of a co-defendant without an opportunity to cross-examine the witness violates the right of confrontation. The petitioner once more request that the court grant review to apply the clear mandate of *Crawford*. Where testimonial evidence is at issue, however, the Sixth Amendment demands what common law required; unavailability and a prior opportunity to cross-examine. *Crawford v. Washington*, 124 S.Ct. at 1374.

B. Admission of the statement of Mr. Watt made to Detective Rick Runge that "he made his own anhydrous ammonia.....also that he didn't believe in theft," violates the clear term of *Crawford*.

This Court ruled, "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required. Unavailability and a prior opportunity for cross-examination." *Crawford v. Washington* 124 S.Ct. at 1374. The Crawford decision provides direction in determining the types of testimonial statements where the Sixth Amendment confrontational clause is applicable.

The court addressed testimonial evidence as being where "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford* 124 S.Ct. at 1364. Another example of testimonial evidence occurs when there is "involvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse." *Crawford* 124 S.Ct. at 1365 n.4. A third scenario constituting testimonial evidence implicating the right of cross examination occurs with a "recorded statement, given in response to structure police questioning, qualifies under any conceivable definition." *Crawford* 124 S.Ct. at 365 n.4.

But the court provided further clarification into what constitutes police interrogation explaining, "we use the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Crawford* 124 S.Ct. 1365 n.4. "Structured police questioning 'qualifies as an interrogation' under any conceivable definition." Id., see also Id., 1371. (characterizing statement in *State v. Bintz*, 650 N.W. 2d 913 (Wis.App 2002)), as testimonial even

though statement was given during a non-custodial interview at a police station. As a comprehensive definition of "interrogation," Black's Law Dictionary 825 (7th Ed. 1999), which defines "investigatory interrogation" as "routine, non-accusatory questioning by police of a person who is not in custody." As the statement testified to by Detective Runge clearly qualifies as testimonial evidence the failure to allow cross-examination requires reversal and new trial to assure the defendant's constitutional right of confrontation.

The prosecutor's statement that he never intended to bring Mr. Watt to trial raises the issue that Mr. Watt was never unavailable. In the Watt case there is a lack of proof of unavailability where no efforts were made to bring Mr. Watt before the jury. The Watt case provides a perfect case for the Court to clarify where testimonial evidence and an "unavailable witness" require the cross-examination of the declarant to ensure the Defendant's Sixth Amendment Right of Confrontation. Once more, the decision of the Washington Court of Appeals contravenes this Courts' ruling in Crawford.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully Submitted,

Roland D. Watson

Watson Law Office

Attorneys at Law

408 Sherman Ave., Suite 202

U.S. P.O. Box 1085

Coeur d' Alene, ID 83816-1085

July 2, 2004

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 21148-7-111**
	)	
Respondent	)	
	)	**Division Three**
v.	)	**Panel Nine**
	)	
	)	
KENDRA LYNN WATT,	)	
	)	**Unpublished Opinion**
Appellant.	)	**Filed July 31, 2003**

KATO, A.C.J. – Kendra L. Watt appeals her convictions for manufacturing and possession of methamphetamine and second degree criminal mistreatment. She contends the State failed to establish the reliability of a person who provided information leading to a warrant to search her residence and garage. She also contends

the court failed to inquire sufficiently into the informant's reliability after she offered evidence casting doubt on statements in the officer's affidavit supporting an application for the warrant. In addition, she contends the court erred in admitting a portion of her husband's guilty plea statement. Finally, she contends cumulative errors require a new trial. We affirm.

On June 1, 2001, officers of the Tri-City Metro Drug Task Force obtained a warrant to search a house and garage in Richland, where Ms. Watt lived with her husband, James Watt, and four children. In a purse in the house's master bedroom, officers found two baggies containing methamphetamine. In the detached garage, officers found a variety of items used to manufacture methamphetamine.

Mr. Watt later pleaded guilty to manufacturing methamphetamine and second degree criminal mistreatment. Ms. Watt was charged with those two crimes and with one count of

possession of methamphetamine. A jury found her guilty of all three crimes.

We first consider whether the search warrant was invalid because the requesting officer's affidavit failed to establish the informant's credibility. The affidavit relied in part on information provided by an unnamed "concerned citizen":

> The concerned citizen is not paid by the Tri-City Metro Drug Task Force and is not working for the Tri-City Metro Drug Task Force for leniency with any charges. This individual has volunteered information to the Tri-City Metro Drug Task Force in the past, in particular to your affiant. This individual requested to remain anonymous at this time. Your affiant had met this concerned citizen approximately two years ago. The concerned citizen was worried about a relative getting involved in the use of methamphetamine. The concerned citizen wanted to supply information regarding the location that the relative was obtaining the methamphetamine from/ The concerned citizen is admittedly a previous user of methamphetamine, however has not used methamphetamine for a long period of time. The concerned citizen would not allow individuals that use methamphetamine into the concerned citizens [*sic*] residence. However, the concerned citizen still has contact with various individuals that participate in the use of illegal narcotics.
>
> In February, March and April of 2000, the concerned citizen had provided information on three separate occasions regarding three separate incidents to your affiant. Two of the incidents involve Sean Dorman and the third report involved Yance Bradley. According to the concerned citizen, both were

involved with manufacturing methamphetamine. Investigation into these allegations, proved the information provided by the concerned citizen to be reliable and truthful. Based on the aforementioned information provided by the concerned citizen, search warrants were applied for and granted. Both subjects were arrested and subsequently convicted for crimes involving possession, intent to manufacture and/or manufacturing methamphetamine and are currently serving time for related charges in a state correctional facility.

On May 31, 2001, at approximately 8:30am, your affiant received a page from the concerned citizen indicating 911 after the phone number. Your affiant called the concerned citizen and the concerned citizen relayed to your affiant that the concerned citizen was at an individual's house the concerned citizen knew as Jim Watt. The concerned citizen stated that him Watt and his wife, Kendra Watt reside on Abbott in Richland, Benton County, WA. The concerned citizen relayed to me that the concerned citizen was worried about the four children also residing at the residence, being neglected and exposed to the drug use occurring at the residence. The concerned citizen indicated that the concerned citizen had been there approximately a week and a half ago. The

concerned citizen stated that he was present when Jim Watt was in the garage with a container with a hose coming out of it, which was dipped into a liquid and that there were bubbles coming out of it. The concerned citizen knew that this was a final phase of manufacturing methamphetamine, however did not know what it was called in the exact process. The concerned citizen stated that after the bubbles stopped, that James Watt placed this in a coffee filter

and then squeezed the filter and dried the substance in the coffee filter. James Watt indicated that this was the methamphetamine. This is consistent with the final phase of manufacturing methamphetamine, which is referred to as "salting out" where the Hydrochloric Gas (HCL) is introduced [into] the methamphetamine base and solidifies the methamphetamine suspended in that solvent. The concerned citizen stated that James Watt had the methamphetamine lab in the garage in a second room, which is partitioned off from the main garage and has a separate door. The concerned citizen then said that concerned citizen had a contact with James Watt on May 30, 2001 and James Watt indicated that he was ready to manufacture methamphetamine, however was unable to obtain Toluene and /or was waiting for Toluene. James Watt went on to explain that he had bought his Toluene in the past from Fred Meyers, however they were now asking an outrageous price for the product and [he] was looking for a new location to purchase the Toluene. Your affiant and the concerned citizen discussed various scenarios in which an undercover officer might possibly be introduced to James Watt. The concerned citizen was worried about taking someone to the residence. Your affiant asked the concerned citizen to see if we could provide Toluene in exchange for finished product. The concerned citizen indicated that the concerned citizen would check into this.

...Your affiant later received another call form the concerned citizen who indicated that the concerned citizen had in fact had contact with James Watt, who advised the concerned citizen that they purchased five gallons of Toluene from the Standard Paints store. Your affiant advised the concerned citizen that your affiant would look into the matter and attempt to conduct an investigation at the location...

Your affiant then contacted the Kennewick Standard Paints store who the Metro Drug Task Force

has received information from in the past regarding the purchase of items commonly used in the production of methamphetamine. Your affiant was advised that they had been notified that the Richland store had just sold a five gallon can of Toluene. Your affiant then contacted the Richland Standard Paints store and spoke with employee, Terry, who indicated that a white female, approximately 5'07", with blonde, dirty hair, wearing a white sleeveless blouse and had what appeared to be acne around her chin area, had come into the store and purchased a five gallon can of Toluene. This description matches the description provided by the concerned citizen and Bi-pin for Kendra Watt. Terry advised your affiant that without Terry asking, the female gave Terry and explanation as to why she was buying so much Toluene, saying that she and her husband had recently purchased a house and were trying to clean adhesive off of tile. It should be noted that a professional painter would only go through roughly a quart of Toluene in one year time span cleaning the painters [*sic*] equipment. Five gallons of Toluene is an excessive amount of Toluene to use to remove adhesive off of tile. . . Terry also noted that the east side (front) of the business contained numerous parking spaces, however the female had parked beside the building, which seemed odd, as she

was buying such a heavy can of product. Terry did observe the vehicle the female was driving and described it as a white Cutlass type older sedan with a maroon vinyl half top and maroon interior, indicating that it wasn't beat up, but was very well used. Terry stated that he would be able to identify the female. Based on your affiant's training and experience your affiant knows that individuals involved in criminal activity will commonly park their vehicles out of view

> in an attempt to avoid witnesses possibly obtaining license plate numbers and/or identifying associates.
>
> . . . Your affiant proceeded in an undercover vehicle to the area of the Watt residence at 402 Abbott and did in fact observe the described vehicle backed up to the garage located at the northeast corner of the property. Attempting to insure that this was the same vehicle, your affiant went to the Standard Paint Store and transported the employee, Terry to that location. Terry saw the vehicle and indicated that he was 99.9% sure that it was in fact the same vehicle.
>
> While your affiant was in the process of drafting this affidavit, your affiant received another call from concerned citizen. Your affiant asked and the concerned citizen stated that Kendra Watt was wearing a sleeveless white blouse and black slacks. Without asking, the concerned citizen gave your affiant the following description of Kendra Watt[:] 5'7", approximately 145 pounds, blond hair and "picky sores" on her chin. Your affiant asked what picky sores were and the concerned citizen indicated that Kendra Watt had been "tweeking" for a long period of time and had been picking "drug bugs" from her chin. Your affiant knows this to be a common trait of individuals that have been using methamphetamine for a long period of time. This also supports Terry's description of the female at the Standard Paint Store having acne on her chin.

Clerk's Papers (CP) at 195-203.

When an informant's tip provides the basis for probable cause to issue a search warrant, the warrant affidavit must establish both the basis of the knowledge and credibility of the informant. *State v. Jackson,* 102 Wn.2d 432, 433, 688 P.2d 136 (1984); *see*

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969); *Aguilar v. Texas,* 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed 2d 723 (1964). An affidavit that fails to establish both prongs of the *Aguilar-Spinelli* test does not establish probable cause, and a resulting search warrant violates article 1, section 7 of the Washington Constitution. *Jackson*, 102 Wn2d at 443-45. Alternatively, the substance of the tip may be corroborated by independent police investigation. *State v. Murray*, 110 Wn.2d 706, 711-12, 757 P.2d 487 (1988).

Here, the officer independently corroborated the informant's information by determining that Ms. Watt had purchased an unusually large amount of Toluene. This was shortly after the informant had

reported that James Watt was looking for a new source of the chemical to be used in the methamphetamine production process. This information independently corroborated the informant's tip, and no showing of the informant's credibility was required.

Even if a demonstration of the informant's credibility were required, the affidavit provided it. An informant's credibility may be established by demonstrating he or she has a proven "track record" of providing accurate information to police. *State v. Colin,* 61 Wn. App. 111, 113, 809 P.2d 228, *review denied*, 117 Wn.2d 1009 (1991). In *Colin*, the affidavit stated:

> "The CI [confidential informant] has been established as a [*sic*] reliable through the course of this investigation. Based on information provided by the CI one arrest has resulted in this investigation. Also, the CI has provided information regarding other narcotics related investigations that have been proven as accurate by other detectives."

Id.

The affidavit here provided an even more extensive track record, stating that the informant had provided information leading not only to arrests but also to convictions of two men. This is a sufficient 'track record" to establish the informant's credibility. The court properly concluded the warrant was valid.

We next consider whether the court abused its discretion by refusing to conduct an in camera hearing to determine whether the informant's identify should be disclosed. Before trial, Ms. Watt

requested a hearing to challenge the search warrant on the basis that the officer's affidavit was untruthful. She offered the testimony of several persons and a photograph showing that the person she believed was the informant was an active methamphetamine user when the warrant was obtained. The court held this evidence was insufficient to demonstrate that the officer had knowingly or recklessly misrepresented the facts in the affidavit. At the end of the hearing, the State voluntarily disclosed that

the informant was the person Ms. Watt believed him to be. The informant, Robert Savage, later testified at trial.

Even when an officer's affidavit in support of a search warrant on its face establishes probable cause, a defendant may seek to invalidate the warrant by showing the officer was not truthful or acted in reckless disregard for the truth. *State v. White*, 50 Wn. App. 858, 864, 751 P.2d 1202 (1988). If the defendant makes a "substantial preliminary showing" of falsity, he or she is entitled to a

Franks hearing to challenge the basis of the warrant. *Id.; see Franks v. Delaware,* 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

When the informant is anonymous, however, the defendant lacks access to the very information required to obtain a *Franks* hearing. *White*, 50 Wn. App. At 864; see *State v. Casal,* 103 Wn.2d 812, 818, 699 P.2d 1234 (1985). In that situation, disclosure of the informant's identity

> may be ordered where necessary to assess the affiant's credibility or accuracy. *Casal* [,103 Wn.2d] at 817. The risks of disclosure in such cases must be balanced against the risk that nondisclosure may conceal police perjury. *State v. Wolken,* 103 Wn.2d 823, 829, 700 P.2d 319 (1985). This rule of discretionary disclosure recognizes the possibility that, in some cases, a search warrant affidavit may contain false allegations. *In re Rosier,* 105 Wn.2d 606, 615, 717 P.2d 1353 (1986); see 1 W. LaFave, *Search and Seizure* § 3.3(g), at 704 (2d ed. 1987).
>
> The procedure for deciding whether to disclose the identity of the informant, and to inquire into the affiant's veracity, is an in camera hearing pursuant to CrR 4.7(h)(6). *Casal* [,103 Wn.2d] at 818-19. Under *Casal,* a court must conduct an in camera hearing if a defendant's affidavit "casts a reasonable doubt on the veracity of material representations made by the affiant. Corroboration of the defendant's story is helpful, but not necessary". *Casal* [,103 Wn.2d] at 820. The *Casal* court cited with approval a federal district court decision ordering an in camera hearing where the defendant made only a "minimal showing of inconsistency".

See United States v. Brian, 507 F. Supp. 761 (D.R.I. 1981).

White, 50 Wn. App. At 865

Ms. Watt contends she made such a minimal showing of inconsistency by offering proof that, contrary to the assertion in the officer's affidavit, Mr. Savage had used methamphetamine around the time he provided the information to the police. There is no merit to her argument for at least two reasons. First, the purpose of a *Casal* hearing is to determine whether the State should be required to disclose the identity of an informant. Here, despite the court's refusal to conduct such a hearing, the State voluntarily chose to disclose that Mr. Savage was the informant. Ms. Watt therefore was not prejudiced by the court's decision. Second, a *Casal* hearing is required only when there is no other *independent* basis for establishing probable cause. *Casal*, 103 Wn.2d at 820-21; White, 50 Wn. App. at 865 n.4. Here, the officer independently determined

that Ms. Watt had purchased an unusually large amount of Toluene (a chemical commonly used to manufacture methamphetamine) under unusual circumstances and had given a suspicious explanation for the purchase. The informant's tip this was not the *sole* basis for establishing the probably cause, and the court did not abuse its discretion by refusing to conduct a *Casal* hearing.

We next consider whether the court violated Ms. Watt's right of confrontation by admitting a redacted copy of her husband's guilty plea statement. At trial, the State sought to enter into evidence a copy of James Watt's "Statement of Defendant on Plea of Guilty." Exhibit 83. the document, originally seven pages, was limited to the first and last pages, which were further redacted to limit Mr. Watt's statement to the following: "I admit to making a small amount of meth[.] I did so in a detached garage on the premises. The children lived on the premises but were not present when I made the drugs." Exhibit 83, page 7.

Outside the presence of the jury, defense counsel objected to the admission of the redacted document:

> Judge, if they think it should be admissible, they should have brought [Mr. Watt] in here to testify to it. He had an opportunity to bring him. And then I would have had the right to confrontation. We would have had the opportunity to confront him. *We would have the intent to assert the marital privilege.* We would have the opportunity to address him about his beating his wife. We would have had the opportunity to address him about the many other things that went on that we would have like to address
>
> We didn't call him primarily because we didn't plan on getting into this area. And if the State intended to get into this area, they should have brought him in so that we would have the right of confrontation. *We would have the right to assert the spousal privilege. I think that we can still asset the spousal privilege.*
>
> Additionally, Your Honor, he is not introducing this as to Mr. Watt because Mr. Watt has already pled guilty. And the Court has already admitted the document where he plead [sic] guilty. He is trying to use this in this case to implicate Mrs. Watt. They have – the Court has allowed them or indicted it is going [to] allow them to enter his plea – parts of it redacted. Now, counsel is once again attempting to introduce the thing that has been redacted and circumvent *my client's right to spousal privilege and we were asserting that in any event.*

Report of Proceedings (RP) at 235-36 (emphasis added).

The court stated it would admit the redacted document, but at defense counsel's request it would instruct jurors to limit their

consideration of it: "I will do the limiting instruction. The sole purpose of the admission is to establish Mr. Watt pled guilty and the jury may consider it for no other purpose." RP at 300. However, the court did not advise jurors of this limitation, either at the time of the document's admission or at the end of the trial.

Later in the trial, when the prosecutor offered a statement of Mr. Watt to Detective Rick Runge, defense counsel similarly argued that the statement would violate Ms. Watt's right of confrontation and that the defense intended to assert the marital privilege. The court overruled the objection, and Detective Runge testified:

> Q. [by the prosecutor]: Well, what did [Mr. Watt] tell you concerning his participation or his activities regarding anhydrous ammonia

> A. He stated that he manufactured the anhydrous ammonia himself. It was fewer
> people to be aware of what he was involved in and he also didn't believe in theft and that's how – [Defense counsel]: Your Honor, I'm going to object. I think this is beyond the scope of the Court's order at this point.
> THE COURT: Sustain the objection.
> Q. [by the prosecutor]: Did you finish your answer? Just my basic question: Did he

say anything about making his own anhydrous ammonia?

A. He said he made his own anhydrous ammonia.

RP at 250. The court denied defense counsel's motion for a mistrial based on this testimony.

The Sixth Amendment protects a defendant's right to confront the witness against him or her. U.S. CONST. AMEND. VI; *see* CONST. ART. 1, § 22. Alleged violations of this right are subject to de novo review. *State v. Larry*, 108 Wn.App. 894, 901, 34 P.3d 241 (2001), *review denied*, 146 Wn.2d 1022 (2002).

Although there is "'a preference of face-to-face confrontation [with witnesses] at trial,'" the Confrontation Clause is not an absolute prohibition against admission of hearsay evidence in a criminal case. *Maryland v. Craig*, 497 U.S. 836, 849, 110 S. Ct. 3157, 111 L. Ed 2d 666 (1990) (quoting *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 65 L. Ed.2d 597 (1980)).

> We engage in a 3-part analysis to determine whether admission of a codefendant's inculpatory statements constitutes reversible error. First, we must determine whether the statements are admissible under our Rules of Evidence. Second, we consider whether additional indicia of reliability satisfy the requirements of the confrontation clause. Finally, even if a statement fails to meet these requirements, we consider whether or not the error was harmless.

> *State v. Whelchel,* 115 Wn.2d 708, 714-15, 801 P.2d 948 (1990).

State v. Rice, 120 Wn2d 549, 564, 844 P.2d 416 (1993).

The first step in this analysis is to determine whether the statement is admissible under the rules of evidence. Mr. Watt's guilty plea statement is hearsay, which generally is not admissible. *See* ER 801(c); ER 802. However, a statement by an unavailable declarant may be admitted if it is against his or her interest. ER 804(b)(3). This rule provides an exception to the hearsay rule for a

> Statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true[1]

ER 804(b)(3).

Under this rule, a hearsay statement against one's interest in admissible "because it is presumed that one will not make a statement damaging to one's self unless it is true." *State v. Roberts*, 142 Wn.2d 471, 495, 14 P.3d 713 (2000) (quoting 5 JACK B.

WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 804.06[1] (1997 & Supp. 1999)). As a result, the rule permits admission of only those potions of the statement that are truly inculpatory. *Roberts*, 142 Wn.2d at 491-95 (adopting the approach announced in *Williamson v. United States*, 512, U.S. 594, 114 S. Ct. 2431, 129 L. Ed. 2d 476 (1994)); *see State v. Crawford*, 147 Wn.2d 424, 435, 54, P.2d 656 (2002), *cert. Granted sub nom, Crawford v. Washington*, 123 S. Ct. 2275 (2003). Self-serving or "finger pointing" portions of a statement are not against the declarant's interest and thus are not admissible and should be redacted. *Roberts*, 142 Wn.2d at 495.

The parties have not cited, nor have we found, any Washington cases addressing whether a person's guilty plea statement may be admitted in a codefendant's trial under ER 804(b)(3). However, recent cases from other jurisdictions suggest the inquiry is fact-specific and requires a close examination of circumstances in which the statement was given. *See United States v. Aguilar*, 295 F.3d 1018, 1022-23 (9th Cir.) (guilty plea statements were reliable because they were "genuinely self-inculpatory"), *cert.*

denied, 123 S. Ct. 404 (2002); *People v. Blades*, 93 N.Y.2d 166, 167, 711 N.E.2d 197, 689 N.Y.S.2d 1

[1] ER 804(b)(3) also provides: "In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." Evidence discovered in the garage corroborated Mr. Watt's statement, indicating its trustworthiness.

(N.Y. App.Div. 1999) (case-specific examination; guilty plea statement must compromise such an interest that it "all but rule[s] out any motive to falsify").

Ms. Watt apparently contends in part that ER 804(b)(3) does not apply because her husband was not "unavailable."[2] A declarant is 'unavailable" if he or she "[i]s exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement[.]" ER 804(a)(1). Washington's spousal testimony privilege provides:

> A husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other,

> examined as to any communication made by one to the other during marriage.

RCW 5.60.060(1). A spouse who is unable to testify because of this privilege is "unavailable" for purposes of ER 804. *Crawford,* 147 Wn.2d at 435.

In his oral argument to the trial court, defense counsel signaled his intention to assert the spousal testimony privilege. Ms. Watt's assertion of the privilege made her husband "unavailable" for purposes of ER 804.

The trial court redacted most of Mr. Watt's guilty plea statement. Only three sentences remained, all of which inculpated him in the crimes with which he was charges: "I admit to making a *small* amount of meth[.] I did so in a detached garage on the premises. The children lived on the premises *but were not present when I made the drugs*." Exhibit 83, page 7 (emphasis added). Although the italicized potions of the statements arguably were self-serving,

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[2]This argument, raised in Ms. Watt's reply brief, is inconsistent with the concession in her opening brief that Mr. Watt was unavailable. *See* Br. Of Appellant at 9. Also, Ms. Watt asserts

repeatedly that the State subpoenaed Mr. Watt to testify at trial. The record shows, however, that it was the *defense*, not the State, that subpoenaed Mr. Watt. Neither party actually called Mr. Watt as a witness

they did not attempt to shift blame to Ms. Watt or any other persons. Under the circumstances, the statements were against Mr. Watt's interest and thus were admissible under ER 804(b)(3).

The second step of the analysis requires a determination whether there are sufficient indicia of reliability to satisfy the requirements of the Confrontation Clause. *Rice*, 120 Wn.2d 549. A "firmly rooted" exception to the hearsay rule automatically satisfies this requirement, but the "statement against interest" exception is not "firmly rooted." *Crawford*, 147 Wn.2d at 435. The statement thus must be examined in the light of nine nonexclusive factors to determine its reliability:

> (1) whether the declarant had an apparent motive to lie; (2) whether the general character of the declarant suggests trustworthiness; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) whether the timing of the statements and the relationship between the declarant and the witness suggest trustworthiness; (6) whether the statements contained express assertions of the past fact; (7)

> whether cross examination could not help to show the declarant's lack of knowledge; (8) whether the possibility of the declarant's recollection being faulty is remote; and (9) whether the circumstances surrounding the statements give no reason to suppose that the declarant misrepresented the defendant's involvement.

Rice, 120 Wn.2d at 566.

Two of these factors are inapplicable or impossible to apply here. The record reveals nothing about Mr. Watt's general character (factor (2)), and the statements were not admitted through the testimony of another witness (factor (5)).

Other factors appear to detract from the statement's reliability: Mr. Watt may have had a motive to lie to take advantage of a plea agreement with the prosecutor (factor (1)), and the statements were not spontaneous (factor (4)).

However, the remaining five factors support the statement's reliability. Mr. Watt certainly made the statement in the presence of more than one person (factor (3)), and there is no dispute that he made it. The statement was an express assertion of past facts (factor (6)), and it is unclear how cross examination could help to show Mr. Watt's lack of knowledge of those facts (factor (7)). In light of the

gravity of the statement's consequence, there is little possibility that Mr. Watt's recollection was faulty (factor (8)). Finally, the statement contains *no* representations of Ms. Watt's involvement in the events (factor(9)).

Under the circumstances, Mr. Watt's guilty plea statement bears sufficient indicia of reliability to satisfy the requirements of the Confrontation Clause. At least three federal circuit courts have reached the same results on similar facts. *See Aguilar,*295 F.3d at 1021-23; *United States v. Centracchio*, 265 F.3d 518, 529-30 (7th Cir. 2001); *United States v. Moskowitz*, 215 F.3d265, 268-69 (2nd Cir.), cert. denied, 531 U.S. 1014 (2000).

Ms. Watt relies primarily on *Bruton v. United States*, 391 U.S. 123, 127-28, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), which, in a joint trial, bars admission of a nontestifying codefendant's statement that names the defendant as a participant in the crime. However, *Bruton* applies only when codefendants are tried *jointly*. *United States v. Briscoe,* 742 F.2d 842, 847 (5th Cir. 1984). Because Ms. Watt was not tried jointly with her husband, *Bruton* is inapplicable. Moreover, even under *Bruton* rule, a codefendant's

statement is admissible if it is redacted to exclude any reference to the defendant. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). Because Mr. Watt's statement was redacted to eliminate any reference to Ms. Watt, *Bruton* would not have applied even in a joint trial.

Ms. Watt contends the court's failure to give a cautionary instruction also violated her right of confrontation. She cites no authority for her argument that a limiting instruction is required in this circumstance, although there is federal authority suggesting such an instruction is necessary when a codefendants guilty plea statement is admitted "to guard against the possible misuse of evidence by the

jury." *Aguilar*, 295 F.3d at 1023. Although Ms. Watt argues a cautionary instruction was required, she did not and has not offered a suggestion for its wording. It is difficult to imagine an instruction under the circumstances that would not have unnecessarily confused the jury. As redacted, Mr. Watt's statement made no reference to

Ms. Watt. It thus is inconceivable that the jury could have viewed the statement as anything other than what it was: a statement of Mr. Watt's guilt.

Ms. Watt also contends 'the problems" of admitting the redacted guilty plea statement "were heightened" by the admission of Mr. Watt's confession to Detective Runge that he manufactured his own anhydrous ammonia. Br. of Appellant at 12. She presumably relies again on B*ruton* but offers no reasoned argument or citation to authority. We decline to address this issue. *See United States v. Phillips,* 433 F.2d 1364, 1366 (8th Cir. 1970) ("naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion"), *cert denied*, 401 U.S. 917 (1971).

Finally, Ms. Watt contends "the *Bruton* error " was exacerbated by the prosecutor's closing argument. Br. of Appellant at 12. The prosecutor argued:

> Mr. Watt, you'll see his Statement on Plea of Guilty, pled guilty because be has the methamphetamine lab and because he was around children. If you find her guilty, if you find her guilty of manufacture of controlled substance, and if you determine that there were kids around, you pretty

> much have to – I would suggest that this follows as night follows day – that she created an imminent and substantial risk there might be a fire, might be an explosion, there's gonna be fumes around, that people could inhale anhydrous ammonia and you could get sick.

RP at 418.

Ms. Watt contends the prosecutor urged the jury to impermissibly infer that she was guilty because Mr. Watt pleaded guilty. This contention misapprehends the prosecutor's argument, which was merely that if Ms. Watt was manufacturing methamphetamine and if there were children on the premises, then the jury could infer from these facts that she recklessly created an imminent and substantial risk of great bodily harm to the children, which are elements of the crime of second degree

criminal mistreatment. *See* RCW 9A.42.030(1). "Counsel are permitted latitude to argue the facts in evidence and reasonable inferences." *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). In context, it is apparent that the prosecutor's reference to Mr. Watt's guilty plea statement was simply to suggest that Mr. Watt, by pleading guilty, acknowledged the reasonableness of the

same inference. The argument thus did not ask jurors to infer anything from Mr. Watt's statement other than his acceptance of guilt. The argument was appropriate.

Ms. Watt has failed to establish a violation of her right of confrontation.

Finally, we consider whether the cumulative effect of errors at trial requires reversal. Due process may require reversal on the basis of the cumulative effects of trial court errors, even if the errors individually are considered harmless. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). But before an appellate court can determine their cumulative effect, the defendant must establish the presence of actual errors. *See State v. Clark*, 143 Wn2d 731, 771-72, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000 (2001).

Most of the contentions Ms. Watt raises here, as part of an almost page-long laundry list of alleged errors, are those that we have addressed and found to be meritless. As for the remaining contentions, Ms. Watt has presented no legal argument or citation to authority, and we decline to address them. *See Holland v. City of*

Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 ("passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration"), *reviewed denied,* 136 Wn.2d 1015 (1998).

Because Ms. Watt has failed to demonstrate any errors at trial, there was no cumulative effect. Reversal is not required on this ground.

The convictions are affirmed.

No. 21148-7-111
State v. Watt

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

s/Kato,

A.C.J.

WE CONCUR:

s/Sweeney, J.

s/Kurtz, J.

APPENDIX 2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74473-4
Respondent,	)	**ORDER**
v.	)	C/A NO. 21148-7-III
KENDRA LYNN WATT,	)	
Petitioner,	)	

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Ireland, Chambers and Fairhurst, considered this matter at its April 6, 2004, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

Dated at Olympia, Washington this 6th day of April, 2004.

For the Court

s/_____

CHIEF JUSTICE

APPENDIX 3

No. 21148-7-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT,

v.

KENDRA L. WATT, APPELLANT.

APPEAL FROM THE SUPERIOR COURT OF BENTON COUNTY

HONORABLE CAROLYN A. BROWN

BRIEF OF APPELLANT

December 20, 2002

Douglas D. Phelps, WSBA #22620
Attorney for Appellant
Phelps & Associates
2903 N. Stout Road
Spokane, Washington 99206
(509)892-0467

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error in admitting redacted *Bruton* materials over the defense objection and in not giving a requested limiting instruction.

2. The trial court committed reversible error by denying the defendant's motion to suppress evidence illegally seized.

3. The trial court committed reversible error by denying the defendant's request for a Casal hearing.

4. The cumulative errors in admitting evidence, jury instructions, and the prosecutorial misconduct during the trial result in a due process violation requiring a new trial.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court commit reversible error in admitting redacted *Bruton* materials over the defense objection and in not giving a requested limiting instruction?

2. Did the trial court commit reversible error by denying the defendant's motion to suppress evidence illegally seized?

3. Did the trial court commit reversible error by denying the defendant's request for a Casal hearing?

4. Did the cumulative errors in admitting evidence, jury instructions, and the prosecutorial misconduct during the trial result in a due process violation requiring a new trial?

B. STATEMENT OF THE CASE

The defendant, Kendra Watt, resided at her home at 402 Abbott Street, Richland, Washington, with her husband James Watt. (RP 317-318) The Tri-City Metro Drug Task Force Detective Rick Runge obtained a search warrant based on his affidavit. (CP 192-205) On June 1, 2001 at approximately 11:00 A.M., the officers of the Metro Drug Task Force executed the search of 402 Abbott Street, Richland, Washington. (RP 51-52) The home was a ranch style home with a detached garage located in the northeast corner of the backyard. (CP 192) Mr. James Watt and Mrs. Kendra Watt were both arrested and charged with drug charges involving the manufacture of methamphetamine. (CP 262-263, 174-175, 241-246)

The prosecution brought a motion to join Mr. Watt's trial with Mrs. Watt's trial. (CP 248; RP Sept. 19, 2001 p. 1-8) The trials were not consolidated and ultimately Mr. James Watt pled guilty (CP Exhibit 83; RP 313-316) while Mrs. Watt proceeded to trial. (RP Vol. 1-3)

Prior to the plea and trial, the parties challenged the sufficiency of the affidavit for the search warrant (CP 231-235) and

requested in the same motion that the confidential informant be disclosed. (CP 227-231) Additional briefing was filed by the defendant Kendra Watt asking the court to grant a request for both a "Franks Hearing" and a "Casal Hearing." (CP 188-205; CP 176-178) The defense motions regarding the search and seizure issues were argued before the Honorable Craig J. Matheson on November 2, 2001. (RP November 2, 2001 p. 1-63) Findings of Fact from that hearing were prepared and filed on December 7, 2001. (CP 168-170) That document refers to "Defendant's List of Witnesses" attached (CP 168) which is in the record in CP 206-208.

On February 14, 2002, the state issued a subpoena for James E. Watt. (CP 165) The case proceeded to trial on March 18, 2002 (RP Vol. 1 p. 1) before the Honorable Carolyn A. Brown. At trial the prosecution indicated that they had no intention of calling James Watt. (RP 8-10) The state argued that it wanted to introduce in opening argument the plea of Mr. James Watt in the trial against Mrs. Watt. The defense objected and the court ruled that this information should not come in during opening statements. (RP 10) But the court indicated a willingness to allow the state to introduce

the "Statement of Defendant on Plea of Guilty" at trial. (RP 11) The defendant noted an exception to the court's ruling. (RP 11)

During the trial, the prosecution called Robert Savage who was referred to as the concerned citizen in the search warrant affidavit. Mr. Savage testified that "he used to get drugs from Kendra Watt." (RP 12) He testified at the trial and claimed to have provided evidence against James Watt out of concern for children. (RP 15-18) Mr. Savage described the process he observed Mr. Watt use in cooking methamphetamine. (RP 18-20) He testified that he assisted the police with cases involving Yance Bradley and Sean Dorman prior to Mr. Watt's case. (RP 23-25) The defense questioned Mr. Savage regarding his ability to "recollect" events (RP 26 line 6-21). The defense questioned him about his drug use and psychiatric admissions. (RP 26 line 11-19) The prosecution objected (RP 26 line 17) arguing it was merely to discredit the witness. The defense argued that the information regarding drug use and psychiatric admissions was admissible for consideration of how it affects the witness's memory or powers of observation and ability to testify accurately. (RP 22 line 13-25 to RP 29 line 14) The court ruled that was not allowed as an area of cross-examination. (RP 29-32)

The state prepared a certified copy of Mr. Watt's Statement of the Defendant on Plea of Guilty, crossing out "I have reviewed the evidence against me on my own with my attorney. I've come to the conclusion that a jury would find me guilty after haring the evidence on all three counts, as well as the enhancement. I wish to take advantage of the State's offer." (RP 87 line 19-25) Other information blocked out included "I admit to making a small amount of meth" and "For my wife's use." (RP 88) The prosecutor sought to admit the redacted pages 1 and 7 of Mr. Watt's Statement on Plea of guilty as Exhibit 83. (RP 88) The two pages that were admitted had large spaces that were blacked out. (Ex 83) The defense argued against admission of the document arguing that if the purpose of admitting the document was to show Mr. Watt's plea that could be accomplished without using the statement on plea of guilty. (RP 89-93) The argument against admission of the document was renewed again prior to admission of the document. (RP 294-300) Cases cited by defense counsel included *State v. Hoffman*, 116 Wn.2d 51 (1991), *Bruton v. United States*, 391 U.S. 123 (1968), and *Gray v. Maryland*, 532 U.S. 185 (1998). A limiting instruction was requested and the court stated, "I will do the limiting instruction. The sole purpose of

the admission is to establish Mr. Watt pled guilty and the jury may consider it for no other purpose." (RP 300 line 2-5) The defense-requested and court ordered instruction was never given after the decision was made by the court to give the limiting instruction. (RP 394-408; CP 119-145)

Additionally, the prosecution at trial sought to introduce hearsay statements allegedly made by Mr. James Watt to Detective Rick Runge that "he manufactured his own anhydrous ammonia." (RP 235) The defense objected arguing that this was an attempt to introduce testimony without granting the defense the right of confrontation. (RP 235-238 and 248-250) The court ruled that only testimony that Mr. Watt made his own anhydrous would be admitted. (RP 238 line 3-10). Then the prosecution brought testimony beyond that allowed by the court's order. Detective Runge testified that "It was fewer people to be aware of what he was involved in and he also didn't believe in theft and that's how. . ." (RP 250 line 6-10). The defense sought a mistrial for the prosecution's violation of the court's order. (RP 250-251) The court refused the defense motion for a mistrial. (RP 251)

The state moved the court to exclude any evidence of physical violence or domestic violence. (RP 303 line 15 to RP 307 line 19) The defense argued for admission of the evidence to show the power and control exerted by Mr. Watt over Mrs. Watt and to show that Mrs. Watt was not allowed into the garage. (RP 305-307) The court excluded testimony about domestic violence perpetrated by Mr. Watt. (RP 307 line 3-14)

In closing argument, the prosecutor argued that, "Mr. Watt, you'll see his Statement of Plea of Guilty, pled guilty because he has the methamphetamine lab and because he was around children." (RP 418) The prosecution argued that if the jury convicted her of manufacture, "that this follows as night follows day – that she created an imminent and substantial risk." (RP 418) Further, in closing argument during rebuttal the prosecutor argued repeatedly, "Mr. Phelps said" (RP 440 line 17-18); "Mr. Phelps said" (RP 441 line 4-5); "Mr. Phelps said, well, maybe" (RP 441 line 13) at which time the defense objected to the personalization of the argument. The court admonished and instructed the prosecutor on how to form the argument. (RP 441-442) The prosecutor then returned to argue, "We know that's true. You can take a look at what Mr. Watt said about

this in his Statement on Plea of Guilty. He said I make methamphetamine." (RP 442 line 1-8) Then the prosecutor returned to arguing about the defense counsel stating, "There is nobody who says that …I'm gonna go back to this – except the defense attorney." (RP 442-443 line 1-2) An objection was made, citing the prosecutorial misconduct in continuing this tactic after a court instruction, with a motion for mistrial. (RP 443 line 7-21) The court denied the motion for mistrial and instructed the prosecutor again. (RP 443 line 23-25)

The case proceeded and the jury was instructed by the court without any limiting instruction on the use of the Statement of Defendant James Watt designated as Exhibit 83. (RP 394-408; CP 119-145) Kendra Watt never testified at her trial. (RP Vol. I – III) The defense moved the court for a new trial (CP 57-67; 95-104; RP April 19, 2002 p. 1-12) which was denied by the court. (CP 46) On May 22, 2002 Kendra Watt was sentenced before Judge Carolyn Brown (CP 6-13; RP May 22, 2002)

C. ARGUMENT

1. The trial court committed reversible error in admitting *Bruton* material over the defense objection and in not giving a requested limiting instruction.

Prior to trial the prosecution served Mr. James Watt, the co-defendant and husband of Kendra Watt, with a subpoena for trial and filed it with the court. (CP 165) The prosecution sought, however, to introduce the "Statement of Defendant on Plea of Guilty" (Ex 83) for the purpose of showing he pled guilty (RP 299-300) without calling Mr. Watt. The defense argued that this was an attempt by the prosecution to avoid the marital privilege and to deny Mrs. Kendra Watt her right of confrontation. (RP 8-11) The defense argued that admission of the Statement of the Defendant on Plea of Guilty raised issues of the right of confrontation under the Sixth Amendment. In oral argument, the defense argued that the court's ruling was controlled by *State v. Hoffman*, 116 Wn.2d 51 (1991), *Bruton v. United States*, 391 U.S. 123 (1968), and *Gray v. Maryland*, 532 U.S. 185 (1998). (RP 296-300) The court allowed the admission of the "Statement of Defendant on Plea of Guilty" excluding pages two

through six and admitting pages one and seven with large spots of those two pages blacked-out. (Ex 83)

In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, "to be confronted with the witnesses against him." U.S. Constitution Amendment 6; *Pointer v. Texas*, 380 U.S. 400 (1965) (apply Sixth Amendment to States). "The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). When the government seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the clause permits the government to deny the accused his usual right to force the declarant "to submit to cross-examination, the greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970).

An appellate court reviews de novo alleged violations of the Confrontation Clause. *United States v. Mayfield,* 189 F.3d 895, 899 (9th Cir., 1999), *United States v. Hoac*, 990 F.2d 1099, 1105 (9th Cir.,

1993). The Washington Constitution provides: "In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . Washington Constitution, Article 1, Sec. 22 (Amend. 10).

The rule regarding the use of statements by co-defendants has been established in a series of cases including *Bruton v. United States*, 391 U.S. 123, 88 S. Ct 1620, 20 L.Ed.2d 476 (1968), and *Gray v. Maryland*, 532 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), and *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct 1702, 95 L.Ed.2d 176 (1987). In *Bruton*, the United States Supreme Court held that the defendant was deprived of his confrontation rights under the Sixth Amendment when he was incriminated by a pretrial statement of codefendant who did not take the stand at trial. *State v. Hoffman*, 116 Wn.2d 51, 75, 804 P.2d 577 (1991). But in *Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987), the United States Supreme Court held that a confession redacted to omit all references to the codefendant fell outside *Bruton's* prohibition because the statement was not incriminating on its face "and became incriminating only when linked with evidence introduced later at trial (the defendant's own testimony.)" *Richardson*, 481 U.S. at 208.

The United States Supreme Court in *Richardson* at 211 held that the limiting instruction is required to advise the jury of the purpose for which the evidence is admitted.

The Supreme Court further defined the contours of the *Bruton* rule in *Gray v. Maryland*, 523 U.S. 185, 188 S.Ct. 1151, 140 L.Ed.2d 294 (1998), in which the prosecution had redacted the non-testifying codefendant's confession by replacing the defendant's name with a blank space or word deleted. *Gray*, 523 U.S. at 188. Rejecting this approach, The Court said:

> Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a class, so closely resemble *Bruton's* unredacted statements that, in our view, the law must require the same result.

Gray, 523 U.S. at 192. The Court reasoned that such statements obviously refer directly to someone, often obviously the defendant, and

> . . . involve inferences that a jury ordinarily could make immediately . . . [T]he accusation that the redacted confession makes this more vivid than inferential incrimination, and hence more difficult to thrust out of mind.

Gray, 523 U.S. at 196. (Quoting *Richardson*, 481 U.S. at 208.) Redacted statements must be (1) facially neutral, i.e., not identify the non-testifying defendant by name (*Bruton*); (2) free of obvious relations such as 'blanks' or 'x' (*Gray*); and (3) accompanied by a limiting instruction (*Richardson*).

In the case before the court, there are large areas of blanked out spots and there was a statement that set between two large blanked out areas with five pages excluded (pages 2–6). (Ex 83) Further, the court never provided the jury with any limiting instruction. (RP 394-408; CP 119-145) Although the court advised counsel that "I will do a limiting instruction." (RP 300 line 2-5) The numerous redactions in the document and the failure of the court to give a limiting instruction require that the case be remanded for a new trial to ensure the confrontation clause is enforced.

Here too the admitted statement included language that the defendant, Mr. Watt, manufactured methamphetamine while the children were present on the premises (Ex 83, p. 7 of 7) This statement addresses specifically the criminal mistreatment charge and Mr. Watt could not be cross-examined or was there any testimony by Mrs. Watt that this statement would be offered to

impeach. The problems of admitting the Statement of Defendant on Plea of Guilty were heightened by admission of the hearsay statements testified to by Detective Runge. (RP 235-238; 250) The Detective essentially vouched for Mr. Watt saying that Mr. Watt "didn't believe in theft . . ." (RP 250 line 6-10)

But the *Bruton* error is made even more damaging to the defendant's due process rights by the prosecutor's arguments in closing. The prosecutor argued that the jury should convict Mrs. Watt of criminal mistreatment because "Mr. Watt, you'll see his Statement on Plea of Guilty, pled guilty because he was around children. If you find her guilty, if you find her guilty of manufacture of controlled substance, and if you determine that there were kids around, you pretty much have to – I would suggest that this follows as night follows day . . . that she created an imminent and substantial risk there might be fire . . ." (RP 418 line 1-17) Here the prosecutor exploits the court's failure to give the limiting instruction by urging the jury to consider Exhibit 83 for a purpose beyond which it was admitted, arguing on impermissible inference.

The problems with the admission of the *Bruton* document are especially problematic given the wording of the statement, the

charges against Mrs. Watt, and the subsequent hearsay statement of Mr. Watt testified to by Detective Runge (RP 250 line 6-10).

The facts as they exist in the Kendra Watt case are almost directly on point with the facts of *United States v. Mayfield*, 189 F.3d 895, 902-903 (9th Cir. 1999). In the *Mayfield* case there were codefendants charged with possession of cocaine with intent to distribute. The Watt case involved codefendants charged with manufacturing methamphetamine. In both the Watt and the Mayfield cases, the court admitted redacted statements of a codefendant against the other defendant at trial. Similarly, in both cases the redacted statements were used in closing argument to implicate the defendant who did not make any statement (Mrs. Watt and Mayfield). In both cases the closing argument was used to raise an impermissible influence that if one person were guilty then they were both guilty. Both Mayfield and Kendra Watt involved defendants who choose not to testify at their trials. Then lastly, in both Mayfield and in the Kendra Watt case, the defense requested a limiting instruction yet the court failed to give one. On these facts the 9th Circuit reversed the trial court and remanded for new trial and for these reasons the defendant seeks remand and a new trial.

2. The trial court committed reversible error by denying the defendant's motion to suppress evidence illegally seized.

A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed *de novo*. *Detention of Petersen v. State*, 145 Wash. 2d 789, 799, 42 P.3d 952 (2002). In the Watt case, the affiant failed to establish the unidentified informant's credibility, the affidavit was facially insufficient as to the necessary showing of probable cause, and the trial judge erred in denying defendant's motion to suppress.

In Washington, the *Aguilar-Spinelli* test is used to determine whether an informant's information establishes sufficient probable cause for a search warrant to be issued. *State v. Bauer*, 98 Wash. App. 870, 874-875, 991 P.2d 668 (2000). The two prongs of this test involve the informant's basis of knowledge, and the informant's reliability. *Id* at 875. Both prongs must be satisfied before probable cause can be found. *Id*. In the event one of the prongs is not satisfied, the warrant fails. *Id*. The police, however, may cure informant insufficiencies by performing an independent, successfully corroborative investigation. *Id*.

In order for an affidavit to establish an informant's reliability, the affidavit must "set forth facts from which the officer can conclude the informant is credible and his information reliable." *State v. Mickle*, 53 Wash. App. 39, 41, 765 P.2d 331(1989). When a citizen informant's name is revealed to the magistrate, the citizen informant may be deemed reliable. *Id.* at 42. When an informant's identity is not revealed to the magistrate, however, there is concern that the information may come from an "anonymous troublemaker." *State v. Ibarra*, 61 Wash. App. 695, 700, 812 P.2d 114 (1991). In order to establish the requisite credibility of an informant who has not been made known to the magistrate, the affidavit needs to provide information to the magistrate demonstrating: 1) a description of the informant; 2) the informant's purpose for being at the location of the alleged illegal activity; and 3) an explanation for the informant's wish to remain unnamed. *State v. Chatmon*, 9 Wash. App. 741, 748, 515 P.2d 530 (1973); *Mickle* at 43. The purpose for such a showing is that, "when a citizen informant furnishes information, that information must still support an inference he or she is telling the truth." *State v. Franklin*, 49 Wash. App. 106, 109, 741 P.2d 83 (1987).

In this case, the officer's affidavit relies heavily on the reports of an unidentified "concerned citizen" in order to make the necessary showing of probable cause. Clerk's Papers at 195-202. Even though the identity of the informant is not disclosed, the officer-affiant also does not provide in any meaningful way any of the factors listed in *Chatmon,* supra, in order to establish the informant's credibility. Accordingly, the officer-affiant failed to establish the informant's credibility, and, because no other facts from the affidavit could support probable cause, the warrant should not have been issued and Defendant's Motion to Suppress should have been granted. (RP November 2, 2001 at p. 57, line 19)

Failure to establish the informant's credibility

First, other than being a former drug user who is not being paid for his information, the affidavit contains no description - physical or otherwise - of the informant. Assuming that the informant is in fact a flesh and blood person currently living in the Tri-Cities area, the officer's affidavit provides no further information which might serve to identify the informant. Thus, the first *Chatmon* factor cannot be found to be satisfied.

Second, the affidavit does not indicate why the informant was at the Watt residence on any of three occasions: May 31, 2001; May 30, 2001; and one and a half weeks prior to the end of May 2001.

First, the search warrant indicates that on May 31, 2001, the concerned citizen-informant communicated to the affiant, after the affiant responded to the informant's encoded telephonic page, that the informant was worried about the children at the Watt residence being subjected to neglect and exposed to drug use. (CP 197) While such concern is commendable, it does not establish why the informant was at the location of the criminal activity. That is, the informant's concern for the children's welfare only indicates an emotional state and the informant's reason for contacting the police; it doesn't reveal anything about the purpose of the informant's visit to the Watt residence.

Next, the informant also asserts that he/she was at the Watt residence the day before making the page to the affiant (May 30, 2001). (CP 198) While there, the informant and Petitioner's husband, James, talked of the fact that James would be ready to start making methamphetamine again, but for the necessary chemical solvent Toluene. (CP 198) The officer-affiant and the informant then talked

of ways to make a trade with James wherein James would receive Toluene, and an undercover agent would obtain finished methamphetamine. (CP 199) Despite this later conversation, no explanation is proffered as to why the informant was at the Watt residence (or in the garage) on May 30, 2001.

Finally, the informant indicates he/she had been in the Watt's garage more than a week before these two visits, and had watched while James Watt, apparently stocked with Toluene, completed the production of methamphetamine. (CP 197) Again, this visit to the Watt garage enjoys no explanation in the pages of the officer's affidavit.

Indeed, it is highly probable that the informant, a (former) methamphetamine user, was at the Watt residence for clandestine or illegitimate reasons. To wit, it seems highly contradictory that the informant here would, on the one hand, proclaim that he/she "would not allow individuals that use methamphetamine in [his/her] residence," and yet, on the other hand, go to and spend time in a place where methamphetamine was being manufactured. (CP 196 and 198)

Further tarnishing the informant's thin gilding of credibility is the fact that he/she in fact had absolutely no concern for the welfare of the children. If the informant in this case was truly concerned about the welfare of the Watt children, two things would not have happened. First, the informant would not have waited almost two weeks before alerting the authorities of the dangers posed to the youngsters at the Watt house. Second, the informant would not have agreed with the officer-affiant to "check into" a way to provide James Watt with the Toluene he needed to immediately restart the process of manufacturing methamphetamine in such grave proximity to his children. (CP 199) In sum, then, not only has the affiant failed to meet the second *Chatmon* factor, the affiant has also revealed that the informant overall has exhibited a serious paucity of credibility.

Third, neither the affiant nor the informant indicates any reason why the informant wants to remain unnamed. While the affiant does indicate that he/she "requested to remain anonymous at this time," no explanation whatever is rendered for this request. (CP 196)

Ultimately, then, the affidavit in this case does not establish the vital credibility that the Aguilar-Spinelli test demands. When the

officer-affiant here sought to keep from the issuing magistrate the citizen informant's identity, the officer-affiant needed to make some further showing to dispel the idea that the citizen informant was not an "anonymous troublemaker" and that the citizen informant's information could "support an inference that he or she [was] telling the truth." *Ibarra* at 700; *Franklin* at 109. The court in *Chatmon* indicated this further showing could be met, and the credibility of an unidentified informant established, by providing three types of information: 1) a description of the informant; 2) an explanation for the informant's presence at the situs of illegal activity; and 3) an explanation of why the informant wanted to remain unnamed. *Chatmon* at 748. None of this information is found in the affidavit that allowed for the search warrant in this case. Even if the informant's utter lack of credibility was a close question without the *Chatmon* factors, which it is not, the informant's de minimus "credibility" was further eviscerated by the informant's inconsistent statements and behavior. As such, the credibility prong of the Aguilar-Spinelli test was never met, and probable cause was not otherwise shown. Therefore, the warrant was improvidently issued,

and the trial judge should have granted defendant's motion to suppress.

3. The trial court committed reversible error by denying the defendant's request for a Casal hearing.

Because the affidavit and Defendant's List of Witnesses brought into question the accuracy of the officer-affiant's factual assertions, a Casal Hearing should have been conducted to both eliminate the possibility of the need for a Franks Hearing, as well as ensure that the search warrant was properly issued.

It has long been noted that, as way of helping the police obtain information, the police are permitted to bestow an "informer's privilege" onto their confidential informers. *State v. Casal*, 103 Wash. 2d 812, 815, 699 P.2d 1234 (1985). However, the privilege of not disclosing an informant's identity is not absolute, and disclosure may be required in cases where the informant is a material witness on the question of the affiant's credibility or accuracy with respect to facts disclosed to a magistrate in order to obtain a search warrant. *Id.* at 817, citing *State v. Haywood,* 38 Wn. App. 117, 684 P .2d 1337 (1984). In the event that "the defendant's affidavit casts a reasonable doubt on the veracity of material representations made by the

affiant," the court should order an in camera hearing (i.e. a Casal Hearing) so long as there is no independent basis for probable cause. *Casal* at 820.

In addition to the in camera hearing provided by *Casal*, defendants are also entitled to a special evidentiary hearing (known as a Franks Hearing) if the defendant can make a "substantial preliminary showing" that the affiant lied or acted in reckless disregard for the truth in obtaining the search warrant. *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978)

In situations such as this one, where the State seeks to keep secret the identity of its informant, the Casal and Franks Hearings are intertwined. That is, these hearings are co-dependent because, without the information potentially discovered in a Casal Hearing, a defendant cannot make the necessary "substantial preliminary showing" required to obtain a Franks Hearing. As the Washington Supreme Court in *Casal* explained:

> In a case where--because the Government's affidavit relies primarily on the use of confidential informants--defendants lack the very information that Franks requires for a threshold showing; where defendants deny, via affidavit, specific facts attributed to them by informants; and where defendants make some minimal showing of inconsistency on the face of the government's material which supports their assertion

> of deliberate falsehood or reckless disregard for the truth, the Court may, and probably should, conduct an in camera interview of the affiant, and, if necessary, of the informants relied upon by the Government. An in camera hearing serves to protect the interests of both the government and the defendant; 'the Government can be protected from any significant, unnecessary impairment of . . . secrecy, yet the defendant can be saved from what could be serious police misconduct.'

Casal at 819, citing *United States v. Brian*, 507 F. Supp. 761 (D.R.I. 1981).

As noted, in order to get a Casal Hearing (which may precipitate a Franks Hearing), the defendant must make only a "minimal showing of inconsistency" between the defendant's information and the State's information. *Casal* at 819. Such a showing was demonstrated by the Washington Court of Appeals. *State v. White*, 50 Wn. App. 858, 751 P.2d 1202 (1988).

In *White*, the police obtained a warrant, supported by the statements of a confidential informant, in order to search the defendants' home for drugs. *White* at 859-860. After a fruitful search, the defendants were arrested and charged. *Id.* The defendants moved to suppress the evidence, and, after this motion was denied, they requested, and were also denied, a Casal Hearing. *White* at 860-861. The bases proffered by the defendants for the Casal Hearing

were simply: an allegation that they knew the identity of the informant; the defendant's belief that the informant would not have made the statements in the affidavit; and specific disputes over facts asserted in the affidavit. *Id.* In ordering new trials and Casal Hearings for the defendants, the Washington Court of Appeals showed how minimal the showing must be to obtain a Casal Hearing: "That the [defendants'] affidavits contain unsubstantiated allegations based on belief, as the State argues, is true. However, the allegations, if accurate, clearly call into question the veracity of the search warrant affiant." *White* at 867. The court explained that the showing was necessarily minimal because, "If…a defendant must provide evidentiary proof of his allegations, the purpose of the Casal hearing process would be defeated. The "informer's privilege" allows the State to maintain the informant's secrecy, and thus denies to the defendant the very information he needs to prove his allegation. For this reason the defendant should be required to make only a "minimal showing of inconsistency." *Id.*

In this case, the Petitioner's offers of proof pointed out substantial differences between her information and the State's information. Such differences raise serious questions about the

"affiant's credibility or accuracy with respect to facts disclosed to [the] magistrate in order to obtain [the] search warrant." *Casal* at 815.

In the affidavit in this case, the officer-affiant alleges the unidentified informant's credibility by telling the magistrate that the informant is merely a previous user of methamphetamine, and that the informant has been sober for some unspecified length of time. (CP at 196) The officer-affiant also characterizes the informant as a "concerned citizen" (CP 195) who is worried about the Watt's children being exposed to drugs (CP 197).

While such phrases suggest that the informant is a reformed drug addict who now wishes to look out for the welfare of the children in his community, the Petitioner's offers of proof attack directly any such contentions of the affiant. As a result, the Petitioner has cast a long and dark shadow of doubt - far more than that which a Casal Hearing requires - on whether the officer-affiant in this case was accurately portraying the informant (and his or her attendant credibility) in his affidavit. As the following offers of proof indicate, the informant was anything but a credible individual, and the officer-affiant's claims to the contrary are nothing less than disingenuous.

First, along with her Motion to Suppress, Petitioner produced no less than six witnesses who were prepared to testify that they had personal knowledge of the informant's use of methamphetamine and other drugs before, during and after the time the informant claimed to be clean. (CP 206-207) Accordingly, that the affiant had described the informant in his affidavit as a sober, uninvolved community caretaker - when the informant was likely anything but - goes directly to the affiant's credibility, for it is highly plausible that the affiant was intentionally covering up his informant's lack of credibility.

Second, if the informant was using drugs at the time of his/her observations and statements, the informant's ability to perceive and remember accurately the details of his/her drug related activities (e.g. visits to the Watt house) is brought seriously into question. That the informant was not only using drugs, but was seriously affected thereby was also alleged. Indeed, an additional witness of the Petitioner was prepared to testify that the informant was exhibiting bizarre, probably drug induced behavior during the months of the informant's visits to the Watt residence as well as at the time the informant gave statements to the affiant. (CP 207) All in

all, six or seven witnesses produced by the Petitioner - all claiming the informant was ingesting drugs - should have been more than enough to raise the possibility that the affiant was inaccurately characterizing the lucidity of the informant. That this number of untrained civilians knew that the informant was using drugs (and was noticeably affected), and yet a highly trained narcotics detective [see three page self-aggrandizing curriculum vitae (CP 193-195)] failed to notice such a condition, practically demands a Casal Hearing on its own.

Third, the affiant's credibility is directly eroded, if not destroyed completely, by the affiant's conspicuous ignorance of the reasonable inferences generated by the informant's admitted activities. It demands no stretch of the imagination to infer that the informant here was using drugs. Assuming this to be true, it asks for no further leap of the imagination to conclude that the informant might have been at the Watt residence trying to obtain methamphetamine for personal or even professional use. Indeed, as noted above, the informant admits to being at the Watt residence, within arms' reach of a methamphetamine laboratory, no less than

three times. We note that, for each visit, the informant has absolutely no innocent reason or excuse for his/her presence.

Additionally, as noted above, the informant claims in the affidavit that he/she would not allow any methamphetamine user into his/her residence. Enigmatically, though, the informant, in the following paragraph of the affidavit (CP 196-197), indicates that he/she has been at the Watt residence and has stood around and talked about the Watt's methamphetamine manufacturing apparatus. Such contradictory statements suggest strongly that he/she was not delivering pure verities to the affiant. That the affiant chose to ignore or otherwise disregard such blatant inconsistencies (and yet knowingly place them in his affidavit) demonstrates little "credibility or accuracy" on the part of the affiant.

Ultimately, the foregoing facts reveal that the Petitioner raised serious issues with the affiant's assertions. As such, the request for a Casal Hearing should have been granted in order to disclose the identity of the informant, and thus allow examination of him/her to determine whether the affiant was in fact making misleading statements. Even though the law dictates that the defendant need only make a slight showing in order to obtain a Casal

Hearing, the Petitioner here was nonetheless denied such a hearing. As a result, the Petitioner was also denied the opportunity to obtain the evidence necessary to deserve a Franks Hearing. Allowing such a determination to stand would completely immobilize a defendant from ever challenging the veracity of the statements an officer-affiant places in his affidavit.

4. The cumulative errors in admitting evidence, jury instructions, and the prosecutorial misconduct during the trial result in a due process violation requiring a new trial.

The Washington courts have adopted the cumulative error doctrine which allows a reviewing court to grant a new trial where an accumulation of errors denies the defendant due process rights. Under the cumulative error doctrine, "several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

The Watt case is such a case where cumulative errors occurred such that the result is a denial of due process. The errors

occurring at trial include the *Bruton* error [*Bruton v. United* States, 391 U.S. 123 (1968)], failure to instruct regarding limiting of the *Bruton* documents' use [*Richardson v. Marsh*, 481 U.S. 200, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)]; the admission of hearsay testimony from Detective Runge that Mr. Watt said he made anhydrous ammonia, essentially 404(b) evidence of other bad acts; the detective's testimony beyond the scope of the court's order regarding statements attributed to Mr. Watt; denial of a motion for mistrial [*State v. Alexander*, 62 Wn. App. 147, 158, 822 P.2d 1250 (1992)]; the court's refusal to allow cross-examination of the confidential informant about his drug use and psychiatric record; exclusion of testimony regarding domestic violence/physical abuse against Mrs. Watt by Mr. Watt; and prosecutorial conduct in closing argument i.e. arguing that mistreatment conviction was required by Statement of Defendant of Plea of Guilty, Exhibit 83; and the personalization of the argument bolstered by the prosecutor's arguing in an unauthorized manner again after the court admonished him about personalized argument).

The defense has previously argued in the brief that the admission of the Statement of Defendant on Plea of Guilty (Ex 83)

was in error. That error was compounded by the trial court's failure to issue the limiting instruction after it was requested by defense counsel and granted by the court. (RP 394-408; CP 119-145) Subsequent to that time, the trial court admitted further statements of the codefendant James Watt through Detective Runge over the defense objection. These statements were admitted with limitation that the only statement allowed was to do with anhydrous ammonia manufacture. But the prosecutor elicited further comments wherein the Detective stated that Mr. Runge indicated an unwillingness to commit theft (effectively vouching for Mr. Watt's honesty). (RP 238 line 3-10) *State v. Alexander,* 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). The court denied the mistrial request made by defense counsel. The errors here all dealt with the admission of hearsay evidence from Mr. Watt.

The errors at trial continued into the closing argument when the prosecutor argued for a conviction on the mistreatment charge by creating an impermissible presumption. The argument encourages the jury to use the codefendant's admission of guilt to lead to the conclusion that Mrs. Watt violated the law "as sure as night follows day. . ." This argument violates the due process right of Mrs. Watt

because the court's stated limiting instruction was that the jury was to consider the Statement only for the purpose of showing Mr. Watt pled guilty. But the prosecutor urged the jury to consider the evidence from the Defendant's Statement on Plea of Guilty to make an impermissible presumption that then Kendra Watt must be guilty of manufacturing and mistreatment of children. The prosecutor was arguing for a statement of the law that was contrary to the rule of law set out by the court's order. In *State v. Alexander*, 64 Wn.App. 147, 154-155, 822 P.2d 1250 (1992), the Court of Appeals ruled that repeated attempts of a prosecutor to introduce inadmissible evidence is misconduct. The prosecutor here impermissibly argued inadmissible evidence after it had been admonished by the court. These cumulative errors are of such significance that the denial of due process requires a new trial.

D. CONCLUSION

The defendant should be granted a new trial because *Bruton* materials were improperly admitted. The court failed to give the limiting instruction required by all courts to avoid improper use by the jury of the codefendant's statements. Then the court failed to

properly consider the sufficiency of the affidavit of probable cause. Finally, the cumulative effect of all the errors occurring in this trial requires a new trial to correct the due process violation. For all of these reasons, the defendant requests a new trial.

Respectfully submitted this _____ day of December, 2002.

_____

Douglas D. Phelps, WSBA #22620

Attorney for Appellant

(3)

No. 04-46

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In The

Supreme Court of the United States

KENDRA LYNN WATT,

Petitioner,

v.

THE STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TERRY J. BLOOR
Attorney of Record
BENTON COUNTY
PROSECUTOR'S OFFICE
7122 West Okanogan Place,
M/S G
Kennewick, WA 99336
(509) 735-3591

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. COUNTER STATEMENT OF CASE

On May 31, 2001, Robert Savage contacted Detective Rick Runge of the Tri-Cites Metro Drug Task Force (Metro) about a methamphetamine lab at the residence of the petitioner, Kendra Watt, and her husband James at 402 Abbott in Richland (RP[1] 13-14, 254-255). The petitioner, James, and three daughters were living at the residence on Abbott (RP 16-17, 52, 103, 105). A niece, Ashley, also either lived at the Abbott residence or visited frequently (RP 17, 52, 112).

Savage was acquainted with both the petitioner and her husband James (RP 12, 20). Before contacting Detective Runge, Savage had observed James Watt cooking methamphetamine in his garage on at least two occasions (RP 14, 19, 254-555). The petitioner was not in the garage during Savage's second visit, although Savage had observed her in the garage when methamphetamine was being cooked the first time (RP 20, 35, 42, 44-45, 50). However Ashley, who was approximately fourteen, was present in the garage on the second occasion methamphetamine was being manufactured, as was another adult male (RP 17, 19). During the second visit, Watt told Savage that he needed Toluene to finish the last batch of methamphetamine (RP 14).

Savage contacted Detective Runge because he was concerned about Ashley's involvement in the methamphetamine manufacture process, cleaning utensils. Savage himself had lost two nieces in a methamphetamine lab fire (RP 15, 17, 42). Savage told Detective Runge that he knew

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[1] Unless otherwise specified, RP refers to the March 18-20, 2002, verbatim report of proceedings of the petitioner's jury trial.

an individual that was manufacturing methamphetamine in a garage with children present, that they were preparing to cook another batch but couldn't get Toluene, and that they had asked him where they might be able to get some (RP 225). Detective Runge asked Savage if he would be able to introduce an undercover detective to provide Toluene in exchange for finished narcotics (RP 225). Savage told Detective Runge that he would check into it, but subsequently informed the detective that the defendant had already purchased five-gallons of Toluene from the Standard Paint store in Richland (RP 225). Detective Runge's independent investigation confirmed that a female meeting the petitioner's description and driving a vehicle seen at the petitioner's residence had in fact purchased five-gallons of Toluene from that store (RP 95-98, 227-228).

Savage did not request or receive any money or favors from Detective Runge or police in exchange for the information which he provided (RP 17-18, 224). His motivation for contacting the police was his concern for the children (RP 18).

Detective Runge applied for and obtained a search warrant for the petitioner's residence at 402 Abbott (RP 228). Metro officers executed the warrant on June 1, 2001 (RP 51-52, 228). Items found in the master bedroom included a black purse which contained two plastic baggies of methamphetamine and dominion papers for the petitioner, scales commonly used to measure narcotics, glass pipes, and receipts for items used in the production of methamphetamine such as HEET, lithium batteries, coffee filters, Toluene, dry ice, denatured alcohol, a coffee grinder, muriatic acid, and pseudoephedrine (RP 53-55, 60-65, 194-195, 204-205, 243-248). Additional methamphetamine and

baggies also were found in a safe in the bedroom (RP 66-72, 206). The petitioner also had a video surveillance camera set up allowing them to monitor the front exterior of their residence from their bedroom (RP 78).

The distinctive chemical odor associated with the methamphetamine manufacturing process was immediately noticeable when officers entered the Watts' garage (RP 230-231). The garage had been vented with tubing, apparently to relieve the buildup of the chemical fumes (RP 123-130, 233). In fact the tubing tested positive for the presence of methamphetamine (RP 149-150, 233).

Numerous items used in methamphetamine production were found in the garage. These included solvents, muriatic acid, tubing, a funnel with residue, extracted ephedrine, scales, a coffee grinder, coffee filters with methamphetamine residue, lithium batteries, lye, Coleman fuel, and water softener salt (RP 130-135, 137-144, 148-149).

A five-gallon container of Toluene was also found in the garage, consistent with the defendant's purchase of Toluene at the paint store (RP 156, 233-234). Although, anhydrous ammonia was not found, James Watt subsequently told Detective Runge that he manufactured the anhydrous ammonia himself (RP 249-250).

The petitioner was charged by amended information with Count I: Unlawful Manufacture of a Controlled Substance, Methamphetamine, with Notice of a Child Present on the Premises During Manufacture, Count II: Unlawful Possession of a Controlled Substance, Methamphetamine, and Count III: Criminal Mistreatment in the Second Degree (CP 174-175).

The petitioner's husband James Watt was also charged with manufacturing methamphetamine with children present, criminal mistreatment in the second degree, and possession of methamphetamine. He subsequently pled guilty to manufacturing methamphetamine and criminal mistreatment in the second degree (Ex. 83).

At trial, the State admitted pages one and seven of James Watt's seven-page Statement of Defendant on Plea of Guilty to establish that he had admitted to making methamphetamine in the detached garage, and that while the children weren't present while he was making the methamphetamine, they did live on the premises (RP 299, 314-317; Ex. 83). On page one, the statement was redacted to omit a reference to Watt's being charged with unlawful possession of a controlled substance. That reference had been lined out in the original statement. A reference to James Watt making methamphetamine for his wife was redacted on page seven (RP 295; Ex. 83). The trial court held that the statement was admissible as a statement against interest (RP 10-11).

The petitioner was found guilty as charged (CP 6-13, 115-118). She subsequently moved for a new trial based on the trial court's admission of her husband's redacted guilty plea statement and the court's omission of a limiting instruction (CP 95-104). Her motion was denied (4/19/02 RP 10-12; CP 46). She filed an appeal to the Washington State Court of Appeals and Supreme Court followed. The conviction was affirmed. The Writ for Certiorari herein followed.

II. SUMMARY OF ARGUMENT AGAINST GRANTING THE WRIT OF CERTIORARI

The admission of the statement on plea of guilty of the petitioner's husband had no effect on the case. It was

cumulative evidence that there was a methamphetamine lab at the petitioner's residence. It had no effect on her defense that she knew nothing about the methamphetamine lab and did not participate in it. Further, the statement on plea of guilty could have been introduced as a public record. The *Crawford* decision would not impact admission of the document in that fashion. *Crawford v. Washington*, 124 S.Ct. 1354 (2004). Finally, there are at least strong reasons why the *Crawford* decision should not be applied to the case herein: the document was presented to a judge, not a law enforcement officer. It was not the result of a colloquy with the judge. An opposing ruling would virtually eliminate the well-established hearsay exception of "statements against interest."

A. Since the petitioner's defense was that she was unaware of, and did not participate in, a methamphetamine lab, any error in admitting her husband's plea of guilty that he had a methamphetamine lab was harmless.

It is important to recognize what the petitioner's defense is. The petitioner did not challenge the fact that there was a methamphetamine lab at her residence. She did not argue that there was a benign explanation for the extracted ephedrine, muriatic acid, lithium batteries, coffee filters with residue, tubing, lye, funnels, denatured alcohol, HEET, and dry ice. Rather her defense was that she had no knowledge of such items.

If the petitioner had claimed the extracted ephedrine, muriatic acid, etc. did not constitute a methamphetamine lab, her husband's statement may have had some impact. If she had claimed that methamphetamine was not produced at her residence, again, her husband's plea may have had some impact. However, the above items proved beyond any doubt that there was a methamphetamine lab

at the defendant's residence. Her husband's plea merely confirmed that fact. The petitioner's defense was that she was unaware of the lab and did not participate in it. Therefore, admission of Mr. Watt's plea of guilty had no impact on this defense. Any error was harmless.

The same can be said regarding the statement of Mr. Watt to Detective Runge that he makes his own anhydrous ammonia. The State concedes that admission of such a statement is more unlikely than admission of the statement on plea of guilty. However, admission of this statement had no bearing on the trial. The petitioner's defense was that she was unaware of her husband's methamphetamine lab, not that he did not have one. The fact that the petitioner's husband operated a methamphetamine lab at their residence is consistent with her defense.

B. The statement on plea of guilty could have been admitted as a public document, under RCW 5.44.010, which would not involve *Crawford*.

Crawford v. Washington, 124 S.Ct. 1354, 158 L.Ed.2d 177, 72 USLW 4229 (2004) cited with approval hearsay exceptions, such as the business records exception, that were by their nature not testimonial. The Respondent suggests the same rationale should apply to the public records exception.

Revised Code of Washington (RCW) 5.44 codifies the public records exception to the hearsay rule. Under 5.44.010 a statement of plea of guilty qualifies as a public record. Assuming that the document is relevant and does not contain objectionable information (*i.e.*, opinion evidence) the document is admissible. *Washington v. Monson*, 113 Wash. 2d 833, 784 P.2d 485 (1989).

This principle has also been recognized by federal courts. In *U.S. v. Gotti*, 641 F. Supp. 283 (E.D. N.Y. 1986) held that Rule 803(8) (which is codified in RCW 5.44) provides an exception to the hearsay rule of "public offices" setting forth among other things "matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding however, in criminal cases matters observed by police officers and other law enforcement personnel." *Gotti*, supra, held the court is a "public office." The judge who took the plea is not a "law enforcement officer" and had a duty to report the fact of the plea when he or she signed the judgment. Therefore, the court held the fact of the plea was admissible under Rule 803 (8).

The Respondent did not argue at the trial court that the "public records" exception justified admission of the statement on plea of guilty. However, evidence is properly admitted if there is any basis to do so.

C. The *Crawford* case should not bar admission of Mr. Watt's statement on plea of guilty.

1. A statement on plea of guilty should not be considered "testimonial" evidence.

(a) The statement on plea of guilty is distinguishable from a colloquy with the defendant about his or her actions.

The Respondent concedes there is at least one case which applied *Crawford,* supra, to exclude admission of statements on plea of guilty. *U.S. v. Massino*, 319 F. Supp. 2d 295 (E.D. N.Y. 2004). However, in this case there was no admission of a colloquy between the judge and Mr. Watt about his actions. Further all references to the Petitioner

were deleted. The jury only knew the basic fact: Mr. Watt pled guilty and admitted that he operated a methamphetamine lab from his residence. The statement on plea of guilty was a fact, and did not involve testimony.

(b) The statement on plea of guilty was made to a judge, not a law enforcement agent.

Crawford, supra, emphasized the history of the Confrontation Clause and cited the role of justices of the peace under Marian statutes. Those judges were required to examine suspects and witnesses in felony cases and certify the results to the court. The examinations came to be used as evidence in some cases. Obviously, judges in the present day do not have such a role. They are not law enforcement officers, *Gotti,* supra, do not conduct pre-trial examinations of witnesses or suspects, and carefully safeguard a defendant's right against self-incrimination.

Crawford should not extend to situations where a co-defendant presents a document for a judge to review and approve.

(c) Cross-examination would have no bearing on the fact that the Petitioner's husband pled guilty.

Crawford emphasized the necessity for the possibility of cross-examination by the adverse party of the declarant. Generally cross-examination may shed light on a declarant's statement. However, it is difficult to see how cross-examination could shed any light on the fact that a defendant has pled guilty. In other words, in this case would Ms. Watt (the petitioner) cross examine her husband with

the hope of illustrating that he is not guilty? Would her attorney attempt to convince the court that Mr. Watt is not guilty, despite his written plea? How could this be done, given that the petitioner claimed she had no knowledge of her husband's methamphetamine lab?

Obviously, the Court's concerns about cross-examination are not fully applicable in the situation herein where the declarant pleads guilty.

2. A contrary result will virtually eliminate the hearsay exception of "statements against interest."

In *Crawford,* supra, the declarant's statement was not against her penal interest. Nevertheless, this hearsay exception is a firmly rooted doctrine. The Respondent respectfully suggests the court will have virtually eliminated this exception if the Writ is granted and the conviction overturned on the basis of admission of Mr. Watt's statement.

The Respondent cites the following from *Lilly v. Virginia,* 527 U.S. 116, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999):

> We assume, as we must, that Mark's statements were against his penal interest as a matter of state law, but the question whether the statements fall within a firmly rooted hearsay exception for Confrontation Clause purposes is a question of federal law. Accordingly, it is appropriate to begin our analysis by examining the "firmly rooted" doctrine and the roots of the "against penal interest" exception.

> We have allowed the admission of statements falling within a firmly rooted hearsay exception since the Court's recognition in *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), that the Framers of the Sixth Amendment "obviously intended to . . . respec(t)" certain unquestionable rules of evidence in drafting the Confrontation Clause. Justice Brown, writing for the Court in that case, did not question the wisdom of excluding deposition testimony, *ex parte* affidavits and their equivalents. But he reasoned that an unduly strict and "technical" reading of the Clause would have the effect of excluding other hearsay evidence, such as dying declarations whose admissibility neither the Framers not anyone else 100 years later "would have [had] the hardihood . . . to question."

III. CONCLUSION

For the above reasons the Court should not grant the Writ for Certiorari.

Respectfully submitted,

TERRY J. BLOOR
Attorney of Record
BENTON COUNTY
PROSECUTOR'S OFFICE
7122 West Okanogan Place,
M/S G
Kennewick, WA 99336
(509) 735-3591

APPENDIX

RCW 5.44.010
Court records and proceedings – When admissible.

The records and proceedings of any court of the United States, or any state or territory, shall be admissible in evidence in all cases in this state when duly certified by the attestation of the clerk, prothonotary or other officer having charge of the records of such court, with the seal of such court annexed.

[1997 c 358 § 7; Code 1881 § 430; 1877 p 94 § 432; 1869 p 115 § 426; 1854 p 195 § 334; RRS § 1254.]

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